

I am unable to agree with Mr. Lingam that the rejection of proof is in every case a matter of form and therefore not final. The notes to the English Rule 261 in *Williams on Bankruptcy* (17th Edition) says as follows:—

"A creditor whose proof has been rejected on the merits cannot withdraw it and present another in the same form, but if the proof has not been adjudicated upon or has been rejected on a point of form it may be withdrawn and a fresh proof tendered."

If the assistant official assignee is right in holding that the statement under section 20(2) of the Money-lenders Ordinance should be submitted with the proof, then the failure to do so is an irregularity that cannot be cured and is fatal to any subsequent proceedings. It was held in *Arjan Singh v. Hashim Angullia & Ors.*<sup>(1)</sup> that:—

"When a moneylender sues upon a moneylending contract, a statement of his account as prescribed in section 7 of the Moneylenders Ordinance must be produced at the time of suing and particulars should accordingly be filed with the writ of summons. Non-compliance with this statutory requirement is an irregularity which the court cannot waive and will entitle a defendant to have the writ of summons set aside with costs."

The above judgment was cited with approval by the Court of Appeal in the case of *Teja Singh v. Rattan Singh*.<sup>(2)</sup>

It would appear to me that the decision of the assistant official assignee could not be regarded as one on a point of form only.

In my view it would still be necessary for the applicant to have the decision made by the assistant official assignee on the 18th October, 1960, set aside and so long as that decision stands the applicant cannot file a fresh one in the same manner.

I am fortified in my judgment to a certain extent by the case of *Brandon v. McHenry*.<sup>(3)</sup> The question in that case was whether a rejection of proof by a trustee in bankruptcy is an act done by him within section 81 of the Bankruptcy Act, 1869, corresponding to section 29(2) of the Bankruptcy Act, 1914, and corresponding to section 20(2) of our own Ordinance. The head-note says:—

"Therefore, where a proof in a bankruptcy under the above-mentioned Act is rejected by the trustee, whose decision is not appealed against, and the bankruptcy is subsequently annulled, such rejection remains valid, and the claim for the amount sought to be proved for is consequently barred."

I would, therefore, dismiss the motion with costs.  
*Motion dismissed.*

Re LOW NAI BROS. & CO.  
Ex-parte OFFICIAL ASSIGNEE  
v. GUTHRIE & CO. (M) LTD. & ORS.

[O. Bk. J. (Gill J.) December 19, 1968]

[Kuala Lumpur — In Bankruptcy No. 70 of 1967]

*Bankruptcy — Money received pursuant to garnishee proceedings — Whether void against official assignee as trustee*

A of bankrupt's properties — Bankruptcy Act, 1967, s. 50(1) & (2).

*Mercantile law — Bankruptcy law — Whether part of mercantile law — Civil Law Ordinance, 1956, s. 5(1) — Discretionary relief — Granting of.*

B The official assignee sought for a declaration that the receipt by the respondents of certain sums of monies in three civil suits pursuant to garnishee proceedings in each of those civil suits in which the respondents were the judgment creditors and the three bankrupts were the judgment debtors were void against him as trustee of the properties of the bankrupts under the provisions of the Bankruptcy Act, 1967 in that the said sums were received by the respondents after the receiving order was made against the said bankrupts on March 20, 1967, and for an order that the respondents do pay the said sums to him as trustee in bankruptcy.

C Held: (1) a creditor who has attached any debt due to the debtor is not entitled to retain the benefit of such attachment against the official assignee unless he has completed the attachment by receipt of the debt before the date of the receiving order;

(2) the test is, not whether there has or has not been a garnishee order absolute, but whether the garnishee proceedings has resulted in actual payment before the making of the receiving order;

D (3) in this case, as the receiving orders against the debtors were made on March 20, 1967, and the respondents as creditors received the benefit of the attachment of the debts due to them on April 14, 1967, they were therefore not entitled to retain such benefits against the official assignee.

Cases referred to:—

- E (1) *George v. Thompson's Trustee* [1949] 1 Ch. 322.  
(2) *Re Lupkovics, Ex parte The Trustee v. Freville* [1954] 1 W.L.R. 1234.  
(3) *Figg v. Moore Brothers* [1894] 2 Q.B. 690.  
(4) *Re Chop Kee Chiang* [1933] M.L.J. 283.  
(5) *Seng Djit Hin v. Nagurdas Purshotumdas* [1923] A.C. 444.

BANKRUPTCY.

F L. Kandan for the applicant.

S. W. S. Davidson for the respondents.

*Cur. Adv. Vult.*

G Gill J.: This is a motion by the official assignee for a declaration that the receipt by the first respondents of the sum of \$10,281.70 in Ipoh High Court Civil Suit 407/65, by the second respondents of the sum of \$3,946.36 in Ipoh High Court Civil Suit 556/65 and by the third respondents of the sum of \$11,421.33 in Ipoh High Court Civil Suit 531/65 on or after 5th April, 1967 pursuant to garnishee proceedings in each of those civil suits in which the respondents were the judgment creditors and the three bankrupts the judgment debtors, are void against him as trustee of the properties of the bankrupts under the provisions of Bankruptcy Act 1967 in that the said sums of money were received by the respondents after the receiving order was made against the said bankrupts on the 20th day of March, 1967, and for an order that the respondents do pay the said sums to him as the trustee in bankruptcy.

I The facts in support of the motion as set out in the affidavit of the senior assistant official assignee, Mr. Muthiah Rajendram, affirmed on 18th December, 1967 and filed in these proceedings are as follows. A receiving order against Low Nai Brothers and Company of No. 35, Jalan Pekeliling, Kuala Lumpur on the

debtors' own petition filed on 7th March, 1967 was made by this court on 20th March, 1967. On the same day How Nai @ Low Nai, How It @ Low Aik and How Tiew Soo as the three partners of the firm were adjudged bankrupt. Notices of receiving and adjudication orders were published in the *Government Gazette* on the 6th day of April, 1967 *vide* Notification Nos: 1257 and 1226.

On the 27th day of March, 1967 the said bankrupts filed their joint statement of affairs disclosing their assets and liabilities. In the list of persons said to be indebted to the bankrupts filed in court on 31st day of March, 1967 one of the debtors disclosed was the Municipality of Ipoh. On the 9th day of April, 1967 the Ipoh Municipality was informed of the receiving and adjudication orders and requested that the amount due to the bankrupts be paid to the official assignee.

On the 22nd day of April, 1967 the official assignee received from the Municipality a letter dated 20th April, 1967 stating that it had paid into the High Court, Ipoh the sums of \$1,395.33 and \$26,472.85 on the 29th day of April, 1966 and the 18th day of January, 1967 respectively in compliance with the garnishment notices served on it.

On 24th April, 1967 the official assignee requested the senior assistant registrar, High Court, Ipoh for the payment to him of the said sums of money paid into court, in view of the receiving and adjudication orders. On 8th May, 1967 the official assignee received a memo dated 6th May, 1967 from the senior assistant registrar confirming the receipt of a total sum of \$27,868.18 from the Ipoh Municipality and stating that the said sum of \$27,868.18 received by him under garnishment notices was distributed as follows after deducting a sum of \$557.33 as sheriff's commission:

| Civil Suit No. | Plaintiff                                                         | Amount paid to Plaintiff's Solicitors | Date of Voucher |
|----------------|-------------------------------------------------------------------|---------------------------------------|-----------------|
| 1. 407/65      | Guthrie & Co. (M) Ltd. now known as Guthrie & Co. (Far East) Ltd. | \$ 1,661.46                           | 13.6.66         |
| 2. 407/65      | Guthrie & Co. (M) Ltd. now known as Guthrie & Co. (Far East) Ltd. | 10,281.70                             | 5.4.67          |
| 3. 556/65      | United Engineers Co. Ltd.                                         | 3,946.36                              | 5.4.67          |
| 4. 531/65      | Ban Aik Kee Co.                                                   | 11,421.33                             | 5.4.67          |
| Total:         |                                                                   | \$27,310.85                           |                 |

The sum of \$1,661.46 having been received by the first respondents before the date of the receiving order, the official assignee demanded refund of the balance of \$25,649.30 received by the respondents as the creditors of the bankrupts after the date of the receiving order. On 19th July, 1967 Messrs. Gibb & Co., acting for the respondents notified the official assignee that their clients denied liability to refund the money received by them from the High Court, Ipoh.

The respondents do not dispute the facts relied on by the official assignee in support of his motion. In

A his affidavit affirmed on 24th January, 1968 and filed in these proceedings Wong Wee Fah, the branch manager of the first respondents in Ipoh, has stated that the first respondents obtained judgment against the firm of Low Nai Brothers and Company for a sum of \$28,013.46 and \$120.00 costs in Ipoh High Court Civil Suit 407/1965 on the 12th day of October, 1965, that their solicitors served a notice of garnishment in the same suit on the Ipoh Municipality on the 21st day of February, 1966, that their solicitors served a garnishment summons on the Municipality on the 28th day of March, 1966 and that the Municipality paid into court the sum of \$26,172.85 on 18th January, 1967 in compliance with the garnishment notices issued by the three respondents.

C It is contended on behalf of the official assignee that the respondents had notice of the commission of an available act of bankruptcy by the debtors when they issued execution against the property of the debtors in the abovementioned civil suits in Ipoh High Court, and that as the attachment by the respondents was not completed by the receipt of their debt before the date of the receipt of their debt before the date of the receiving order they are not entitled to retain the said sums of money received by them as against the official assignee by reason of the provisions of section 50(1) of the Bankruptcy Act, 1967.

D The respondents contend that they did not have notice of the commission of any available act of bankruptcy until after payment to them of the above-mentioned amounts on 5th April, 1967, and that execution levied against the bankrupt firm by them in the above-mentioned civil suits should not be construed as an available act of bankruptcy within the meaning of section 50(1) of the Bankruptcy Act, 1967. They also contend that they did not have notice of the presentation of any bankruptcy petition by or against the bankrupt firm until after payment to them of the sums mentioned. They further contend that the payment by the Municipality of the sums mentioned into court on 18th January, 1967 in compliance with the garnishment notices served by the three respondents should be regarded as completion of the attachment for the purpose of section 50(1) of the Bankruptcy Act, 1967.

G It is clear that there is no dispute as regards the payment to the first respondents of the sum of \$1,661.46 in civil suit 407/65 on 13th June, 1966. As regards the payment out of \$25,649.39 by the senior assistant registrar, High Court, Ipoh, it is common ground that vouchers in respect of such payments were issued on 5th April, 1967 but that the respondents did not physically receive the money until 14th April, 1967.

H As far as the official assignee is concerned the issue would appear to be very simple. He relies solely on section 50(1) of the Bankruptcy Act, 1967, which reads as follows:

I "Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due, or property belonging to him, he shall not be entitled to retain the benefit of the execution or attachment against the Official Assignee unless he has completed the execution or attachment before the date of the receiving order and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor."

Section 50(2)(b) of the Act says that for the purpose of this Act "an attachment of a debt is completed by receipt of the debt."

It is to be observed that, quite apart from the question as to whether or not he has notice of the presentation of any bankruptcy petition by or against the debtor or of the commission of any available act of bankruptcy by the debtor, a creditor who has attached any debt due to the debtor is not entitled to retain the benefit of such attachment against the official assignee unless he has completed the attachment by receipt of the debt before the date of the receiving order.

The terms of section 50(1) and section 50(2) of our Act are similar to those of section 40(1) and section 40(2) of the English Bankruptcy Act, 1914. As to the construction of the provisions of the English Act, in so far as garnishee orders are concerned, it was held in *George v. Thompson's Trustee*<sup>(1)</sup> that the test was, not whether there had or had not been a garnishee order absolute, but whether the garnishee proceedings had resulted in actual payment before the making of the receiving order. The judgment creditor in that case had obtained a garnishee order, upon which the garnishee paid the money into the county court. The creditor applied for payment out, but owing to the county court's lack of funds, the money was not available until after the receiving order had been made. It was therefore held that the creditor had not "completed his attachment" and was not entitled to the money. That decision was considered and applied in *Re Lupkovics. Ex parte The Trustee v. Freville*,<sup>(2)</sup> which also deals with attachment of moneys payable by the Crown.

It was urged by counsel for the respondents that the two cases I have mentioned in the last paragraph are not binding upon this court. That of course is perfectly true. But they are of such persuasive authority that I am in full agreement with them. In the present case the receiving orders against the debtors were made on 20th March, 1967. The respondents as creditors received the benefit of the attachment of the debts due to the debtors by the Ipoh Municipality on 14th April, 1967. They are therefore not entitled to retain such benefits as against the official assignee. They are only entitled to the sheriff's costs, and it is in evidence that such costs were deducted before the money was paid out to them.

The question of notice to the respondents of the presentation of the bankruptcy petition by the debtors or of the commission by the debtors of an available act of bankruptcy is to my mind wholly irrelevant to these proceedings. The respondents are probably right in their contention that they had no notice of the bankruptcy petition, but I do not see how they can argue that they had no knowledge of the commission of an act of bankruptcy on the part of the debtors. Section 3(1)(e) of the Bankruptcy Act 1967 provides that a debtor commits an act of bankruptcy

"if execution issued against him has been levied by seizure of his property under process in an action or in any civil proceeding in the High Court, Sessions Court or Magistrate's Court where the judgment, including costs, is for an amount of five hundred dollars or more."

A The attachment by the respondents of the debt due to the debtors by the Ipoh Municipality was clearly an available act of bankruptcy, of which the respondents must be taken to have had notice. This is clear from the decision of *Figg v. Moore Brothers*<sup>(3)</sup> which was followed in *Re Chop Kee Chiang*,<sup>(4)</sup> in which it was held that an execution creditor is not entitled to retain the benefit of his execution as against the official assignee if the judgment debtor is subsequently adjudged bankrupt and that any proceeds of the execution received by him must be paid by him to the official assignee.

C It was lastly urged on behalf of the respondents that the court should grant discretionary relief as provided in section 115(2) of the English Companies Act 1947, the provisions of which are applicable in this country by reason of the provisions of section 5(1) of the Civil Law Ordinance, 1956 which reads as follows:

D "In all questions of issues which arise or which have to be decided in the States of Johore, Kedah, Kelantan, Negri Sembilan, Pahang, Perak, Perlis, Selangor and Trengganu with respect to the law of partnerships, corporations, banks and banking, principals and agents carriers by air, land and sea, marine insurance, average, life and fire insurance, and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case at the date of the coming into force of this Ordinance, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law."

E Section 115(2) of the English Companies Act 1947 reads as follows:—

F "The rights conferred by sections forty and forty-one of the Bankruptcy Act, 1914, on the official receiver or trustee in bankruptcy in relation to executions against the goods or other property of the debtor and attachments of debts due to the debtor may be set aside by the court in favour of the creditor to such extent and subject to such terms as the court may think fit."

G As was stated by the Privy Council in *Seng Djit Hin v. Nagurdas Purshotumdas & Co.*,<sup>(5)</sup> the first thing to be settled is: has a question or issue arisen in this court "with respect to mercantile law generally." The question to be decided here is a question as to the law of bankruptcy. I do not think there can be any doubt that the law of bankruptcy is part of the mercantile law. I am therefore of the opinion that the court has discretion to apply the provisions of section 115(2) of the English Companies Act, 1947. But the next question which naturally arises is: have the respondents made out a case for the court to exercise such discretion? In my opinion they have not succeeded in doing so. *Williams on Bankruptcy* (17th edition) at page 328 states that where section 115(2) of the Companies Act, 1947 applies,

H "the court has apparently a free hand to do what is right and fair in the circumstances of the case, but it seems that some species of imposition must be shown to have been practised by the debtor upon the execution creditor, whereby the creditor has been unfairly delayed and deprived of his rights, or else that the creditor has been otherwise unfairly kept out of his money or possession."

I *George v. Thompson's Trustee*<sup>(1)</sup> is mentioned in a foot-note at page 335 of *Williams on Bankruptcy* as one of the types of cases to which the new discretionary relief would seem to be applicable. In the present

case, however, there is no evidence whatsoever of any species of imposition having been practised by the debtor upon the respondents as execution creditors, whereby they were unfairly delayed and deprived of their rights. Nor is there an iota of evidence that they were otherwise unfairly kept out of their money. The money was in court all the time, and if they were not diligent enough to take steps to have it paid out to them earlier they have only themselves to blame. In the circumstances I feel that it would be wrong for this court to exercise any discretion in favour of the respondents.

For the reasons I have stated I would make the declaration asked for on the motion and an order that the respondents do pay to the official assignee the money received by them. They must also pay the costs of these proceedings in proportion to the amounts received by them.

*Order accordingly.*

Solicitors: *Shearn, Delamore & Co.; Gibb & Co.*

### SUNDRAM v. CHEW CHOO KHOON

[O.C.J. (Pawan Ahmad J.) March 24, 1969]

[Ipoh — Originating Motion No. 13 of 1968]

*Land Laws — Foreclosure application — Hearing of — Application to set aside decision of collector refusing postponement of hearing — National Land Code, 1965, ss. 28(2), 37, 260 and 418(3).*

This was an application to set aside the decision of the Collector of Land Revenue, Kuala Kangsar, refusing to postpone the hearing of a foreclosure application to a date to be fixed after the final disposal of a suit in the High Court at Ipoh. The main ground of appeal raised by the applicant was that the collector was not competent to adjudicate the rights of the parties in view of the claims made by the applicant in Civil Suit No. 232 of 1967 and therefore the collector was wrong in refusing to postpone the enquiry fixed by him to a date to be fixed until after the suit had been finally heard and decided.

Held, allowing the application: section 37 of the National Land Code states that an appeal shall be against any decision or order given in "any inquiry" and by any standard of interpretation, the words "any inquiry" would include a "proposed inquiry" stated in section 28(2) of the Code and therefore the applicant was entitled to appeal against the refusal of the collector to grant his application under section 28(2) for a postponement of the hearing of the enquiry under section 260 until after the final disposal of the suit.

*Case referred to:-*

(1) *Suppiah v. Ponnampalam* [1963] M.L.J. 202.

### ORIGINATING MOTION.

*N. Sharma* for the applicant.

*S. N. Leow* for the respondent.

*Cur. Adv. Vult.*

**Pawan Ahmad J:** This is an application by Mr. Sharma on behalf of the applicant to set aside the decision of the Collector of Land Revenue, Kuala Kangsar, contained in his letter dated 16th November 1967 refusing to postpone the hearing of Kuala Kangsar Foreclosure Application No. 5/1966 to a date to

A be fixed after the final disposal of Ipoh High Court Civil Suit No. 232 of 1967.

B Briefly, sometime between 1960 and 1964 the applicant executed three charges, namely, Charge Presentation Nos. 2961/60, 5231/61 and 10384/64 on his land held under E.M.R. No. 721 for Lot No. 3379 in the Mukim of Sungei Siput in the district of Kuala Kangsar (hereinafter referred to as the "said land") in favour of the respondent as security for loans made on three separate occasions during that period. Sometime later the respondent filed before the Collector of Land Revenue, Kuala Kangsar, Kuala Kangsar Foreclosure Application No. 5/1966 against the applicant for an order for sale of the said land under section 260 of the National Land Code, 1965.

C Subsequent to the filing of the foreclosure application by the respondent, the applicant on 12th May 1967 filed Ipoh High Court Civil Suit No. 232 of 1967 praying for a declaration that the said three charges executed by him on the said land in favour of the respondent are void and unenforceable against the applicant and in addition praying for ancillary reliefs.

D On 6th November 1967 the applicant's counsel sent a letter to the collector requesting for a postponement of the hearing of Kuala Kangsar Foreclosure Application No. 5/1966 to a date to be fixed after the final disposal of Ipoh High Court Civil Suit No. 232 of 1967 in view of the allegations raised by the applicant in his statement of claim and because of the judgment of the High Court dated 23rd October 1967. At the same time the collector was also asked for his decision under section 28(2) of the National Land Code. On 16th November 1967 the collector replied saying that as the High Court had not made an order stopping him from hearing the foreclosure application, it would be heard in his office at 10.00 a.m. on 21st December 1967.

E The main ground of appeal raised by the applicant is that the collector is not competent to adjudicate the rights of the parties in view of the claims made by the applicant in Ipoh High Court Civil Suit No. 232 of 1967 and therefore the collector was wrong in refusing to postpone the enquiry fixed by him to a date to be fixed until after Ipoh High Court Civil Suit No. 232 of 1967 has been finally heard and decided.

F In his statement of claim the applicant seeks to obtain a declaration that the three charges executed by him on his said land in favour of the respondent are void and unenforceable against him because the respondent practised fraud and also because he was not a licensed moneylender during the relevant period. It is the contention of the applicant that by reason of section 69(a), (d) and (g) of the Courts Ordinance 1948, the collector has no jurisdiction to decide on immovable property involving cancellation of instrument or declaratory order raised by the applicant in his statement of claim. The relevant provisions of section 69 of the Courts Ordinance 1948 are as follows:

"69. Sessions Courts shall have no jurisdiction in actions, suits or proceedings of a civil nature —

(a) relating to immovable property except as provided in sections 70 and 71 of this Ordinance;